IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1473

NADEAN O. McARTHUR,

Petitioner,

vs.

THE HONORABLE PHILIP G. NOURSE,
Circuit Judge of the
Nineteenth Judicial Circuit of Florida,
In and For Okeechobee County,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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OPINIONS BELOW

The order of the Supreme Court of Florida denying Petitioner's Suggestion for Writ of Prohibition (Pet. App. A)[1] is as yet unreported. The order of the Circuit

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[1] "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari.

Court of the Nineteenth Judicial Circuit of Florida, In and For Okeechobee County, denying Petitioner's Motion to Dismiss the Indictment on double jeopardy grounds (Pet. App. B) is also unreported. The opinion of the Supreme Court of Florida reversing Petitioner's conviction and affording Petitioner a new trial is reported at 351 So. 2d 972 (Pet. App. C).

JURISDICTION

The order of the Supreme Court of Florida denying Petitioner's Suggestion for Writ of Prohibition was entered on March 31, 1978. The Petition for Writ of Certiorari was filed on or about April 13, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Whether, in the circumstances of this case, retrial of Petitioner is permitted

under the Double Jeopardy Clause where the Florida Supreme Court reversed her conviction for "insufficiency of the evidence" and remanded the cause to the Trial Court for a new trial.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ***(N)or shall any person be subject for the same offense to be twice put in jeopardy of life or limb***.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ***(N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULE INVOLVED

Florida Appellate Rule 6.16 (b) provides:

> Upon an appeal by the defendant from the judgment the Appellate Court

> shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal. Upon an appeal from the judgment by a defendant who has been sentenced to death the Appellate Court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not.

STATEMENT

On June 10, 1973, Petitioner's husband, Charles M. McArthur, was fatally wounded by a gunshot in the bedroom of his home. Petitioner was the only other person present in the bedroom at the time of the shooting. On August 30, 1973, she was indicted on charges of First Degree Murder by the Okeechobee County, Florida, Grand Jury.

Petitioner's trial commenced on April 14, 1975, before a jury. The State's case was based upon both scientific

and non-scientific evidence--including testimony regarding Petitioner's emotional state following the shooting and conflicting statements given by her at the scene--intended to demonstrate the falsity of Petitioner's contention that the shooting was accidental.[2]

After presenting its case, the State rested and Petitioner moved for a judgment of acquittal. The trial court denied the motion. The defense then presented its case and rested.[3] Once again Petitioner moved for a judgment of acquittal and again the motion was denied by the trial court.

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[2]A summary of the evidence as found by the Supreme Court of Florida in support of its holding is found in that Court's opinion at 351 So. 2d 972 (Pet. App. C). A detailed recitation of the evidence at trial is unnecessary to a determination of the issue before this Court.

[3]Petitioner did not testify in her own behalf. Her version of the shooting came out through testimony regarding her statements at the time of her husband's death.

Following closing arguments of counsel and the court's instructions, the case was submitted to the jury. On April 23, 1975, the jury returned a unanimous verdict of guilty of first degree murder.

Following the jury's verdict, Petitioner renewed her motion for a judgment of acquittal, which was again denied by the trial court which held that the evidence was sufficient to sustain the verdict.

On May 2, 1975, Petitioner filed a Motion for New Trial with the trial court (App. 1-8).[4] This motion set forth thirty-three (33) alleged grounds in support of Petitioner's request for a new trial. Of these thirty-three (33) grounds asserted, twelve (12) related to the alleged

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[4]"App." refers to the Appendix to this brief.

insufficiency of the evidence to support the verdict. Included among these twelve (12) sufficiency of the evidence allegations were Petitioner's contentions--asserted throughout this case and ultimately ruled upon in her favor by the Supreme Court of Florida--that the evidence presented by the State, being circumstantial in nature, was not sufficient to exclude every hypothesis of innocence, including Petitioner's explanation shortly after the shooting that her husband's death was accidental.

On May 9, 1975, the trial court entered an order and opinion denying Petitioner's Motion for New Trial (App. 9-15). In the course of that opinion the trial court stated (App. at p. 9):

> Grounds 2, 3, 13, 14, 15, 16, 17, 18, 20, 23, 26 and 27, all relate to an alleged insufficiency of the evidence

> in this case. The sufficiency of evidence has already been determined by the Court in its order denying the Defendant's Post Verdict Motion for Judgment of Acquittal.

Thereupon, the trial court adjudged Petitioner guilty of first degree murder and sentenced her to life imprisonment.

Petitioner appealed her conviction to the Supreme Court of Florida. On September 30, 1977, that Court rendered its opinion reversing Petitioner's conviction. McArthur v. State, 351 So. 2d 972 (Fla. 1977) (Pet. App. C). The Court's holding was based on its view of the evidence as being insufficient to exclude all reasonable hypotheses of innocence, including Petitioner's claim of accident. This holding sustained the precise arguments set forth by Petitioner, and rejected by the trial court, in the Motion for New Trial filed after the

verdict (App. 1-8). The Court concluded its opinion by holding (351 So. 2d at 978; Pet. App. C, at p. 15):

> Our jurisprudence and the justice of the cause require that the conviction entered below be reversed and that Appellant, if the state so elects, be afforded a new trial.

A petition for rehearing filed by the State was denied on December 6, 1977, and the Supreme Court of Florida issued its mandate directing further proceedings in the trial court.

On December 20, 1977, the State filed in the trial court a Motion to Set Cause for Trial. On January 4, 1978, Petitioner responded with a Motion to Dismiss alleging a double jeopardy bar to reprosecution. On January 20, 1978, the trial court entered an order denying Petitioner's Motion to Dismiss and granting the State's Motion to Set Cause for Trial,

scheduling the trial for July 10, 1978 (Pet. App. B).

On February 23, 1978, Petitioner filed a Suggestion for Writ of Prohibition in the Supreme Court of Florida seeking to prevent her reprosecution. The suggestion was denied on March 31, 1978 (Pet. App. A), and Petitioner now seeks review in this Court.

ARGUMENT

Petitioner contends that the Double Jeopardy Clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, bars her reprosecution in the case at bar due to the Florida Supreme Court's reversal of her conviction on sufficiency grounds. Respondent submits, however, that the Double Jeopardy Clause, as delineated by this and a myriad of other courts, both State and Federal, does not bar reprosecution of Petitioner in the

circumstances of this case and in the context of Florida appellate procedure. Nor, as a matter of constitutional interpretation and policy considerations, should that clause be interpreted as Petitioner suggests.

Respondent's constitutional and legal arguments concerning the issue presently before this Court, were generally briefed and argued to this Court in Greene v. Massey, 546 F. 2d 51 (5th Cir. 1977), cert. granted, 432 U.S. 905 (1977) (No. 76-6617, argued November 28, 1977).

As such, we deem it unnecessary to repeat verbatim our arguments in that case and, in the interest of judicial economy, we would refer this Court to respondent's arguments in Greene as advanced in respondent's Brief in Opposition to the Petition for Writ of Certiorari, respondent's Brief on the Merits and oral argument, as those arguments

apply to the circumstances of the present case.[5] Generally, our argument in Greene, and similarly in the present case takes into account several factors which support our view that the Double Jeopardy Clause is not a bar to reprosecution in Florida where an Appellate Court reverses a conviction for insufficient evidence and

[5]Greene v. Massey, supra, was before this Court in a different procedural posture than the instant case, to-wit, by way of federal habeas corpus. 28 U.S.C. 2254. As such, the issue was there briefed and argued as to whether federal habeas corpus review was available to a defendant to assert a violation of the Double Jeopardy Clause where that issue had been fully and fairly considered in the State Courts (see Respondent's Brief on the Merits, Argument A, pp. 9-21). Accordingly, depending upon this Court's resolution of the habeas corpus issue in Greene, it is conceivable that the double jeopardy issue presented therein may not even be reached by this Court. However, as will become apparent throughout the remainder of this brief, the double jeopardy arguments advanced by the respondent in Greene (Id. Argument B, pp. 22-40) are applicable in the present case and, as will be demonstrated, militate strongly against Petitioner's contentions herein.

remands the cause for a new trial.

First, in a long line of Federal and State cases, including this Court's decision in Bryan v. United States, 338 U.S. 552 (1950), it has become well established that the Double Jeopardy Clause does not bar reprosecution when an Appellate Court reverses a conviction on the basis of insufficiency of the evidence. These decisions are grounded not only upon the traditional view that when a defendant successfully attacks his conviction on appeal he foregoes any double jeopardy claims upon being retried, but also, in the Federal system, upon the broad discretion vested in the Appellate Courts by operation of 28 U.S.C. 2106 to enter those orders appropriate to the circumstances of individual cases. Similarly, in Florida, the appellate courts are vested with broad discretion, pursuant to

Florida Appellate Rule 6.16 (b),[6] to fashion remedies appropriate to the circumstances of each case in the "interests of justice."

Second, the aforementioned Florida Appellate Rule specifically contemplates the option of ordering a new trial where an appellate court deems it appropriate in the interests of justice after reviewing the sufficiency of the evidence.

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[6]This rule was in effect at all times relevant to the present case. On March 1, 1978, the Florida Appellate Rules were superseded by the new Florida Rules of Appellate Procedure. New Rule 9.140 (f) provides:

> Scope of Review. The court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.

This rule has been viewed as justifying reversal of a conviction and the ordering of a new trial where, although the evidence may be legally and technically sufficient to support the jury's verdict, nonetheless, its weight is sufficiently weak to require a new trial in the interests of justice. For example, in Tibbs v. State, 337 So. 2d 788 (Fla. 1976), the Supreme Court of Florida, in reviewing a conviction for rape and murder, held (Id. at 791):

> We recognize that the resolution of factual issues in a criminal trial is peculiarly within the province of a jury, but in this case a man's life has been placed in jeopardy and the Florida Legislature has directed that we review the "entire record"...
>
> Rather than risk the very real possibility that Tibbs has nothing to do with these crimes, we reverse his conviction and remand for a new trial.

See also Askew v. State, 118 So. 2d 219 (Fla. 1960); Lowe v. State, 19 So. 2d 106 (Fla. 1944).

Thus, it is readily apparent that a mechanism has been created in Florida whereby an appellate court, out of an abundance of caution, can reverse a conviction and order a new trial where, irregardless of the sufficiency of the evidence as a matter of pure law, the case is such that the interests of justice require a second trial. Dealing within this framework, it is once again submitted that the Double Jeopardy Clause is not a bar to reprosecution of Petitioner.

Third, it is quite clear that criminal defendants are often placed in the position of choosing between two or more courses of action, often equally undesirable to them, during the course of the criminal proceedings of which they are a part. However, once they have chosen the course of action to pursue, they cannot subsequently be heard to complain. For

example, in United States v. Dinitz, 424 U.S. 600 (1976), this Court held that even though the Defendant in that case was faced with what amounted to, at least from his perspective, a "Hobson's Choice", his motion for a mistrial, which was granted, precluded a subsequent claim of double jeopardy when the State sought to retry him. See also, Lee v. United States, ___ U.S. ___, 97 S. Ct. 2141 (1977). Similar considerations apply where, as in the present case, a defendant makes a motion for a new trial alleging insufficiency of the evidence and subsequently appeals the conviction on the same grounds.

The case at bar once again presents a strong argument against the position propounded by Petitioner. At the outset, it is interesting to note that in Petitioner's detailed and exhaustive recitation of the procedural history of this case, nowhere

is mention made of her Motion for New Trial of May 2, 1975 (App. 1-8). Respondent submits that this omission, whether inadvertent or intentional, is a significant indication of the weakness of Petitioner's argument when observed in the light of the anomalous result which would obtain from sustaining that argument. Had the trial court granted a new trial pursuant to one of the sufficiency of the evidence grounds asserted by Petitioner in her motion, could it seriously be argued that the Double Jeopardy Clause would have operated to bar the new trial, which was the specific relief prayed for? Such a contention could not logically be upheld. Cf. United States v. Dinitz, supra.

The trial court, of course, did not grant Petitioner's Motion for New Trial. The Supreme Court of Florida, however, did reverse the conviction and order a

new trial on grounds specifically asserted in the Motion for New Trial. Respondent submits that what the trial court could have done in this case without violating the Double Jeopardy Clause, the Supreme Court of Florida could certainly do as well.[7]

The spectre of endless retrials envisioned by Petitioner (Pet. 19) if her

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[7]It is apparent from the Supreme Court's order that it was of the view that the trial court had erred in not granting a new trial. Accordingly, the court reversed on the basis of that error and corrected it by granting the new trial which had previously been sought by Petitioner. Moreover, even in People v. Brown, 99 Ill. App. 2d 281, 241 N.E. 2d 653 (Ct. App. 1968), a case cited by Petitioner (Pet. 16-17), the Illinois appellate court stated:

> If his double jeopardy rights are deemed to have been waived by his request for a new trial, the waiver should then take effect only if the reversal is granted for the reasons contained in the new trial request....

This is precisely what occurred in the case at bar.

arguments are not accepted by this Court, is an illusion. Petitioner has not demonstrated that such a situation has ever occurred in Florida. Moreover, defendants such as Petitioner are protected against the possibility of such vexatious litigation. The appellate courts of Florida retain the authority to discharge a defendant completely if the evidence is insufficient and the interests of justice would be served by a discharge. Florida Appellate Rule 6.16 (b).[8] And, should a defendant be the object of retrials attempted in bad faith, the traditional protections afforded by the Due Process and Equal Protection Clauses of the Fourteenth Amendment would remain available.

In summary, then, Petitioner's retrial for first degree murder will not violate

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[8] New Rule 9.140 (f) of the Florida Rules of Appellate Procedure, effective March 1, 1978.

the Double Jeopardy Clause given the appellate procedure in Florida which empowers the appellate courts to exercise, out of an abundance of caution, their discretion, to afford maximum protection to criminal defendants, particularly those charged with serious crimes. Moreover, in the case at bar, Petitioner has received the precise relief prayed for, and on the precise grounds asserted, in the trial court.

CONCLUSION

For the foregoing reasons, as well as the reasons and arguments advanced in respondent's briefs in this Court in Greene v. Massey, supra, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT
OF THE NINETEENTH
JUDICIAL CIRCUIT OF
FLORIDA, IN AND FOR
OKEECHOBEE COUNTY.

STATE OF FLORIDA,	
-vs-	CASE NO. 73-74-CF
NADEAN O. McARTHUR,	
Defendant.	

MOTION FOR NEW TRIAL

The Defendant, NADEAN O. McARTHUR, by and through her undersigned attorneys, moves the Court to grant her a new trial, in the above-styled cause, upon the following grounds:

1. That the verdict is contrary to the law.

2. That the verdict is contrary to the weight of the evidence.

3. That the evidence is insufficient to warrant or support a conviction of the Defendant of the offense charged in the indictment or any lesser included offenses of second degree murder, third degree murder or manslaughter.

4. That the evidence fails to show any motive whatsoever on the part of the Defendant to effect the death of her husband as alleged in the indictment.

5. That the Court erred in denying the motion of the Defendant for a change of venue.

6. That the Court erred in denying the motion of the Defendant for a change of venue in that it announced, prior to denial thereof and subsequent thereto, at the time of the selection of the jury, that it would deny counsel for the Defendant the opportunity to inquire of the individual prospective jurors,

out of the presence of the general venire and other prospective jurors, as to what had been discussed by and with them regarding the facts of the case, what they had read, heard or seen regarding the facts of the case prior to trial, and what opinion, if any, they had expressed or had expressed to them, regarding the guilt or innocence of the Defendant, in view of the fact that all of the prospective jurors questioned under oath showed that they had in fact, read, heard or seen accounts of the facts in this case and had, in fact, heard and discussed the facts of this case prior to trial; that some of the jurors who were actually selected and sworn as jurors in this case acknowedged having formed and expressed opinions as to this case; and that the failure of the Court in requiring whatever inquiry was to b. made, if any, in the presence of the other prospective jurors, was to require the

Defendant to suffer the contamination of the entire venire regarding what an individual juror may have read, heard or seen, what the prospective juror may have heard and generally discussed, regarding the facts of this case, prior to trial, and what opinions they may have formed or expressed, regarding the guilt or innocence of the Defendant, in order for the Defendant to have either intelligently challenged a particular juror for cause or to have intelligently exercised a peremptory challenge, as pertained to said individual juror based upon what he or she may have read, heard or seen or discussed regarding the facts of this case or based upon an opinion which he or she may have formed and/or expressed regarding the guilt or innocence of the Defendant.

7. That the Defendant was deprived of a fair and impartial trial by virtue of the provision of the Florida Statute excluding, at

the option of the individual prospective juror, any mother of a minor child or children, under the age of eighteen years, upon the basis that to exclude the same constituted a taking of a cross-section of individuals who were, in fact, contemporaries of the Defendant and, therefore, it constituted a discrimination against her, under the United States Constitution and the Constitution of Florida, based upon her sex and age, and based upon her need for a jury which constituted a cross-section of the people of Okeechobee County, Florida, and the community in which she lived covering all aspects of life and of the eligible jurors in the community; and that said Florida Statute is unconstitutional under the United States Constitution and the Constitution of Florida.

8. That the Court erred in limiting the interrogation of prospective jurors by counsel for the Defendant, by extensive questioning by the Court, itself, and, then, refusing to allow

counsel for the Defendant to interrogate said jurors as to the same areas of interrogation; that such limitation of such action by the Court were contrary to the Statutes of Florida, and that the Defendant was thereby denied due process of law under the United States Constitution and the Constitution of Florida.

9. That the Court deprived the Defendant of a fair and impartial jury and erred in restricting the questioning of the prospective jurors, in that it refused to allow individual jurors to be questioned out of the presence of the general venire and other prospective jurors, regarding what they may have read, heard or seen in news media relating to the facts of this case, regarding what they may have discussed regarding the facts of the case or had discussed with them, and regarding the opinions may have been expressed to them or by them regarding the guilt or innocence of the Defendant or regarding

any other opinions they may have formulated.

10. That the Court erred in disallowing certain questions that were asked of a number of jurors, to be asked of subsequent jurors, in the following particular areas: (1) lack of evidence, (2) requiring the evidence not only to be consistent with guilt but inconsistent with innocence, and (3) requiring the State to prove beyond and to the exclusion of a reasonable doubt that the homicide was not accidental.

11) That the Court erred in excusing for cause a juror or jurors under the provisions of Section 913.13, Florida Statutes upon the ground that he or she had beliefs or convictions which precluded him or her from finding the Defendant guilty of an offense punishable by death; and that said Statute is unconstitutional under the United States Constitution and the Constitution of Florida.

12. That the juror, Bertah L. Williams,

was guilty of misconduct in answering questions upon voir dire examination, as shown in a separate inquiry before the Court, and in denying any connection with law enforcement when, in fact, her daughter-in-law, Mrs. Glynda Williams, is employed in the Office of Sheriff John W. Collier, Okeechobee County, Florida, as a Deputy Sheriff; and the Court erred in failing therein to declare a mistrial.

13. That the evidence is insufficient to overcome the account of the tragedy by the Defendant that the Death of Charles M. McArthur was the result of an accident.

14. That the verdict, based entirely upon circumstantial evidence, was based upon circumstances which were not proved beyond a reasonable doubt.

15. That the verdict, based entirely upon circumstantial evidence, was based upon circumstances which were not inconsistent

with the innocence of the Defendant.

16. That the verdict, based entirely upon circumstantial evidence, was based upon circumstances which were not of such a conclusive nature and tendency to remove a reasonable doubt of the innocence of the Defendant.

17. That the verdict, based entirely upon circumstantial evidence, was based upon circumstances which were susceptible of at least two reasonable constructions and the Defendant was not given the benefit of the construction indicating innocence.

18. That the evidence relied upon by the State failed to prove that the death of Charles M. McArthur was not caused by accident.

19. That the Court erred in failing and refusing to give the requested charge, No. XLV, of the Defendant as follows:

"Where circumstantial evidence is relied upon to convict a person

charged with crime, evidence must not only be consistent with Defendant's guilt but must also be inconsistent with any reasonable hypothesis of her innocence, and evidence which leaves nothing stronger than suspicion that Defendant committed the crime is not sufficient to sustain a conviction."

20. That the evidence relied upon by the State is insufficient to exclude every reasonable hypothesis that the death of Charles M. McArthur was accidental.

21. That the Court erred in refusing to permit the witness Suddreth to state his opinion as to the condition of the Defendant on the morning of the tragedy, whose appearance had been described by him and others as calm. (Tr. 852-854, 855).

22. That the Court erred in sustaining the State's objection to questions propounded

to the witness Sue Matthews as to the condition of the Defendant on the morning of the tragedy and in refusing to permit the witness to express her lay opinion in respect to Defendant's condition.

23. That the jury, having heard testimony of experts that the physical facts were consistent with unlawful homicide as well as with innocence, failed to appreciate and give the defendant the benefit of the rule of law presuming her innocent and requiring the jury in such circumstances to acquit the Defendant.

24. That the jury was confused and misled by the repeated statements by counsel for the State that Defendant gave several inconsistent accounts of how the tragedy occurred, evidently considering that because of the supposed inconsistency of her accounts, the jury was justified in disregarding her account and substituting such supposed inconsistency for proof by the State that Defendant fired the gun with intent to effect the death

of her husband, which required proof was completely lacking.

25. That the jury was confused and misled by the repeated statements by counsel for the State that Defendant gave several inconsistent accounts of how the tragedy occurred, although such supposed inconsistency resulted from the conflicting accounts of the three officers of the single interview with Defendant and not from any conflict in Defendant's account of how the tragedy occurred.

26. That the verdict of the jury is based on speculation, surmise and conjecture without any evidence from which a premeditated intent to effect the death of Charles M. McArthur could be inferred.

27. That from the evidence as a whole, reasonable men would be obliged to conclude that the handgun in question was defective and would fire not only by pull on the trigger but would also fire without touch of the trigger

when cocked, or by the hammer being pulled back and released before coming into a fully cocked position, therefore, the State's burden was to prove beyond a reasonable doubt that the gun was intentionally fired by the defendant, with respect to which there was complete absence of proof.

28. That the Court erred in denying the Defendant's Motion for a Judgment of Acquittal at the close of the case for the prosecution upon the Constitutional and other grounds argued by counsel for the Defendant thereon.

29. That the Court erred in denying the Defendant's Motion for a Judgment of Acquittal at the close of the taking of all of the evidence in the trial of the case upon the Constitution and other grounds argued by counsel for the Defendant thereon.

30. That the Court erred in following the proceedings to determine sentence under the provisions of Section 921.141, Florida Statutes, in that said Statute is unconsti-

tutional under the United States Constitution and the Constitution of Florida.

31. That the advisory sentence of the jury that the Defendant be sentenced to life imprisonment, under Section 775.082 (1), Florida Statutes, which would require the Defendant to serve no less than twenty-five (25) calendar years before becoming eligible for parole, unless the proceeding held to determine sentence according to the procedure set forth in Section 921.141, Florida Statutes, results in findings by the Court that the Defendant be punished by death, if unlawful, unconstitutional under both the United States Constitution and the Constitution of Florida; and that Section 775.082(1), Florida Statutes, is unconstitutional, under both the United States Constitution and the Constitution of Florida, in that it constitutes cruel and unusual punishment with a total disregard of all of the facts and circumstances surrounding the

conviction and totally ignores the statutory and Constitutional provisions for pardon, parole and probation.

32. That said Florida Statutes, Sections 921.141 and 775.082(1), violate the equal protection clause of both the United States Constitution and the Constitution of Florida as they pertain to this Defendant and other Defendants sentenced to life imprisonment, or purporting to be sentenced to life imprisonment, for the offense charged in the indictment and other offenses so punishable as they apply to the eligibility of this Defendant and other Defendants for parole and probation.

33. That the Defendant was convicted of the crime charged in the indictment, without due process of law; that for causes hereinabove set forth, not due to the Defendant's own fault, she was denied due process of law under both the United States Constitution

and the Constitution of Florida; and that for causes hereinabove set forth, not due to the Defendant's own fault, she did not receive a fair and impartial trial.

DATED on this 2nd day of May, 1975

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NINETEENTH JUDICIAL CIRCUIT
IN AND FOR OKEECHOBEE
COUNTY, FLORIDA

STATE OF FLORIDA,	
-vs-	CASE NO. 73-74 CF
NADEAN O. McARTHUR	
Defendant.	

ORDER DENYING DEFENDANT'S
MOTION FOR NEW TRIAL

THIS CAUSE came on for hearing upon the Defendant's Motion for a New Trial. The motion contains 34 grounds, all of which have been considered by the court.

Grounds 2, 3, 13, 14, 15, 16, 17, 18, 20, 23, 26 and 27, all relate to an alleged insufficiency of the evidence in this case. The sufficiency of evidence has already been determined by the court in its order denying the Defendant's Post Verdict Motion for Judgment of Acquittal.

Ground 4 is based upon the allegation that the evidence failed to show any motive whatsoever on the part of the defendant to effect the death of her husband. This is not a legal basis for granting a new trial. As stated in Florida Standard Jury Instructions, Section 2.12(f), "If you find there is an absence of evidence suggesting a motive for the defendant to commit the crime charged, the absence of such motive is a circumstance which you should consider. However proof of motive is never necessary to a conviction." In this case there was competent evidence from which the jury could have found that the defendant would receive a substantial financial benefit as the result of her husband's death. This finding could have suggested to the jury a motive for the defendant to have committed the crime charged.

Ground 5 is based upon the contention that the court erred in denying the motion of the defendant for a change of venue. At the time her pre-trial motion for change of venue was denied, the court indicated that the denial was without prejudice and could be renewed by the defendant if it became apparent that it was not possible to select a fair and impartial jury in Okeechobee County. A jury, acceptable to both the defendant and the State, was selected during the first two days of the trial. The State utilized five of its challenges and the defendant used seven of her challenges. There remained a total of 97 prospective jurors in the venire who had not been called. Defendant's Motion for Change of Venue was not renewed prior to acceptance of the jury panel by the defendant and there has been no showing that the twelve jurors selected

were not fair and impartial. It cannot be inferred that the jury was not fair and impartial simply because a guilty verdict was returned. The information obtained from prospective jurors during voire dire examination, in the court's opinion, established that defense counsel had greatly overestimated and exaggerated the effect of pre-trial publicity on the minds of prospective jurors. There has been no showing that the court erred in denying Defendant's Motion for a Change of Venue.

Grounds 7 and 9 relates to the court's denial of the defendant's request to interrogate prospective jurors individually, in isolation, separate and apart from other prospective jurors. Individual questioning of prospective jurors out of the presence of the general venire is not required by the Rules of Criminal Procedure. Such a procedure has

not been recognized by any appellate decisions in the State of Florida and is contrary to the general practice through the State. Also, in this case it would not have been practical or feasible to have kept more than 100 members of the venire outside the courtroom while prospective jurors were questioned individually, one at a time, in the courtroom. In the court's opinion there was no abuse of discretion in denying defendant's request.

Ground 7 alleges that the defendant was deprived of a fair and impartial trial by virtue of the provision of Florida Statute 40.01(1), which provides "that expectant mothers and mothers with children under 18 years of age, upon their request, shall be exempted from Grand Jury and Petit Jury." There is no legal basis for this contention. The Florida Supreme Court in the case of

Hoyt v. State, 119 So. 2d. 691 (1960), pheld the constitutionality of the former Section 40.01(1), which provided in part "that the name of no female person shall be taken for jury service unless that person has registered with the Clerk of Circuit Court her desire to be placed on the jury list." The former Statute was more restrictive than the present Section 40.01(1) in that it required the affirmative act of registration by a woman before she could be called for jury service. Hoyt v. State, supra, was appealed the Supreme Court of the United States where the decision of the Florida Court was unanimously affirmed. Hoyt v. Florida, 368 U.S. 57, 7 L. Ed 2d. 118, 82 S.Ct. 159 (1961). Justice Harlan, speaking for the court, held that the Statute did not violate the 14th Amendment, either upon its face, since it was based on a reasonable classification, or as it

was applied, since it was not shown that Florida had arbitrarily undertaken to exclude women from jury service. The present Section 40.01(1) allows even more women on juries. All women are subject to being summonsed, and, only expectant mothers and mothers of children under 18, upon their request, are exempted. This exemption is certainly based upon a reasonable classification and the manner in which it is exercisable rests upon a rational foundation. A woman who attacks her conviction of crime on the ground that the State arbitrarily excluded women from jury service has the burden of proving her allegation. The present Section 40.01(1) is not unconstitutional on its face. Neither was it unconstitutionally applied in this case. It did not prevent the defendant from having a cross section of the people of Okeechobee County on her jury. The jury in fact consisted of

six white women and one black woman, four white men and one man of oriental descent. Several of the women on the jury were mothers of minor children.

Defendant's grounds 8 and 10 allege that the court erred in limiting the interrogation of prospective jurors by counsel for the defendant and by the court questioning prospective jurors itself. Rule 3.300(b) Rules of Criminal Procedure provides that after the prospective jurors are sworn: "The court shall then examine each prospective juror individually, except that, with the consent of both parties, it may examine the prospective jurors collectively. Counsel for both the state and defendant shall be permitted to propound pertinent questions to the prospective jurors after such examination by the Court." The voire dire examination of prospective jurors in this case was conducted in accordance with the Rules of Criminal

Procedure. It is the opinion of the Court that defendant's counsel were not unduly restricted in their questioning and were allowed to propound "pertinent questions" to the prospective jurors after examination by the court.

Ground 11 alleges that Section 913.13 Florida Statute is unconstitutional. Defendant does not name any specific potential juror who was eliminated from her trial by operation of this Statute. However, in any event, the Florida Supreme Court in the case of Baker v. State, 335 So. 3d 327 (1960) specifically upheld the constitutionality of this Statute. The Statute in question is in conformity with the holding of the United States Supreme Court in Witherspoon v. State of Illinois, 391 U.S. 510 88 S.Ct. 1770 30 L. Ed 2 776 (1969).

In ground 12 the defendant alleges that

the juror, Bertha L. Williams was guilty of misconduct in answering questions upon voire dire examination. The court held a separate evidentiary hearing on these allegations and has determined that there was no misconduct on the part of Bertha L. Williams which would have required the court to declare a mistrial or grant a new trial.

For ground 19 defendant asserts that the court erred in failing to give her requested Jury Instruction No. XLV on circumstantial evidence. The court instructed the jury on circumstantial evidence using Florida Standard Jury Instructions, Section 2.13. In the court's opinion, the Florida Standard Jury Instruction correctly and adequately instructed the jury on circumstantial evidence and that it was not necessary to give the additional instruction requested by the defendant.

In grounds 21 and 22, the defendant alleges that the court erred in refusing to permit the witnesses, Sudrath and Matthews,

to state their opinions as to the condition of the defendant on the moring of the shooting. Neither of these witnesses were qualified as experts to give their opinion as to the physical or mental condition of the defendant. Both witnesses were allowed to testify as to what they observed about the defendant and how she was acting.

In grounds 24 and 25 the defendant complains of statements by the State Attorney that the defendant gave inconsistent accounts of how the shooting occurred. There was competent evidence from which the jury could have found that the defendant did give inconsistent accounts of how the shooting occurred. The statements by the State Attorney were proper comments on the evidence and were not improper arguments to the jury.

In grounds 30 and 32 defendant contends that Section 921.41 Florida Statute is unconstitutional. There is no basis for

defendant's contention. The constitutionality of Section 921.41 has been upheld by the Florida Supreme Court in the case of State v. Dixon, 283 So. 2d. (1) (1973) and subsequent cases.

By grounds 31 and 32 defendant attacks the constitutionality of Section 775.082, Florida statute. This Statute would require defendant to serve no less than twenty-five calendar years before becoming eligible for parole if she were sentenced to life in prison rather than death. In the court's opinion, Section 775.082 is constitutional. The determination of maxium and minimum penalties to be imposed for violation of the law remains a matter for the Legislature.

Ground 34 alleges that the court erred in denying the Defendant's Motion to Sequester the Jury. Rule 3.370, Rules of Criminal Procedure, provides that "after the jurors have

been sworn they shall hear the case as a body and, within the discretion of the trial judge, may be sequestered." The court made its decision not to sequester the jury after the voire dire examination was completed. After listening to the answers given by the prospective jurors during the two days of jury selection, it was apparent to the court that defense counsel had greatly overestimated and exaggerated the impact and effect of pre-trial publicity on the prospective jurors. It was the court's opinion at that time that it would not be necessary to sequester the jury and to have done so would have imposed an unnecessary personal hardship on the jurors. The members of the jury were kept together during the day and through the lunch hour. Before being allowed to separate in the evening they were carefully and repeatedly instructed and cautioned by the court. There has been no showing, and the court has no reason to believe, that the members of the jury did not strictly comply with the court's instructions.

There has been no showing that the jury's verdict was in any way effected by the court's decision not to sequester the jury. The court remains of the opinion that it was not necessary to sequester the jury in this case, and that to do so would have imposed an undue personal hardship on the jurors.

Grounds 28 and 29 allege error in the court's denial of Defendant's Motions for Judgment of Acquittal made during the trial. These matters have already been cosidered and disposed of in the court's order denying Defendant's Post Verdict Motion for Judgment of Acquittal. The remaining grounds, 1 and 33, are simply general statements that the verdict is contrary to the law and that the defendant did not receive a fair and impartial trial. After a review of the evidence and the applicable law, it is the court's opinion that

the verdict is not contrary to the law and that the defendant did receive a fair and impartial trial. It is therefore

ORDERED AND ADJUDGED that Defendant's Motion for New Trial be and the same is hereby denied.

DONE AND ORDERED at Okeechobee, Okeechobee County, Florida, this 9th day of May, 1975.

(s) James E. Alderman
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I furnished three (3) copies of the foregoing brief to counsel for Petitioner, Chester Bedell, Esquire, 1500 Barnett Bank Building, Jacksonville, Florida 32202, and to Raymond E. Ford, Esquire, Post Office Box 3307, Arcade Building, 121 North Fourth Street, Fort Pierce, Florida 33450, this _____ day of May, 1978.

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